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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

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NO. .....

B. FRANK CAMP, *Petitioner,*

v.

STATE OF ARKANSAS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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STATE OF ARKANSAS, *Respondent*.

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Petitioner B. Frank Camp respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arkansas in this proceeding, which judgment became final on April 5, 1971.

OPINION BELOW

The opinion of the Supreme Court of Arkansas appears in the Appendix hereto. It is reported at 249 Ark. 1075, ... S. W. 2d .....

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on February 15, 1971. It became final on April 5, 1971, when Petitioner's timely petition for rehearing was denied. This petition for certiorari

was filed within ninety days of the latter date. This Court has jurisdiction under 28 U. S. C. § 1257 (3).

QUESTIONS PRESENTED

1. Whether Petitioner's federal right not to incriminate himself was violated by the prosecuting attorney's repeated references, in closing argument to the jury to his failure to testify in his own defense.

2. Whether Petitioner waived his federal right to object to this improper and prejudicial argument because his lawyer requested the trial court to give a cautionary instruction after the State had concluded its argument, instead of interrupting the argument to object immediately.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> nor shall any person be compelled, in any criminal case, to be a witness against himself.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Petitioner was charged with embezzlement under Ark. Stat. § 41-3927. At his trial in the Circuit Court of Mississippi County, Arkansas, Osceola District, he did not testify. He did, however, introduce evidence in his own defense (R. 159-61, 281, 282).

The prosecuting attorney's closing argument to the jury (following argument by Petitioner's trial counsel) included these statements:

> There hasn't been one word, one iota of evidence or testimony to contradict, explain away, the state's case. It is admitted. It is conceded. It is uncontradicted. It is undenied (R. 213).
>
> There is not one iota, not one word of denial or excuse or justification (*ibid.*).
>
> He admits it. Why didn't he come up here and plead guilty and face his punishment? Pay his debt to society? Why? Because all of this evidence overwhelmingly, which isn't contradicted in any way whatsoever, proves him guilty? (R. 218)

Promptly upon the conclusion of the prosecutor's closing argument, and before the jury retired, counsel for Petitioner requested the following instruction:

> The prosecuting attorney has told you that the proof on behalf of the State here has not been contradicted or disputed by the defendant. You are instructed that the defendant's plea of "not guilty" constitutes a denial and contradiction of every fact introduced by the State, and you are not allowed to draw any

> conclusion derogatory to the defendant from his failure to take the witness stand in his own behalf (R. 228-29).

The Circuit Court rejected this request on the ground that it was not timely: that is, that it had not been made *before* argument, at the time when both sides submitted requested jury instructions. The jury then retired and returned a verdict of guilty.

On appeal, Petitioner urged that the prosecutor's reference to his failure to take the stand required that his conviction be reversed. The court below rejected this contention and affirmed the judgment of conviction and sentence of five years' imprisonment in the Arkansas State Penitentiary. The total reasoning of the Supreme Court of Arkansas on the point was contained in one paragraph, App. pp. 6a - 7a:

> Appellant also complains of certain arguments made by the prosecuting attorney in his jury summation and of the trial court's failure after the arguments to instruct the jury that a plea of not guilty constitutes a contradiction of every fact introduced by the State. Appellant did not object to the instructions given before the arguments commenced nor to the matter of which he now complains while the argument was being made. Thus he is not now in a position to complain that the trial court erred. *Parrott v. State*, 246 Ark. (April 14, 1969). 439 S. W. 2d 924; *Stockton v. State*, 239 Ark. 228, 388 S. W. 2d 382 (1965).

On petition for rehearing, Petitioner argued that the rule of state procedure thus invoked to deny him an on-the-merits adjudication of his federal claim was itself an unreasonable clog on the exercise of a federal right and a denial of due process of law (Brief in Support of Petition for Rehearing, pp. 1-6). In addition, Petitioner submitted affidavits from three jurors, including the jury foreman, as exhibits to his Brief in Support of Petition for Rehearing. Each of these affidavits stated, in pertinent part:

> I wondered why Mr. Camp failed to testify and explain his side of the case.
>
> One reason I voted to convict him was because he failed to testify in his own defense.
>
> This failure of Camp to testify did influence our deliberations in the jury room. It affected me, and I know it affected others. We discussed this while we deliberated in the jury room as to his guilt and in assessing his punishment.
>
> I also recall that the Prosecuting Attorney in his closing argument referred to Camp's failure to take the stand and testify. This argument was persuasive on me in causing me to vote to convict Camp.
>
> The truth is the truth. Let justice be done.

The Petition for Rehearing was denied without opinion.

REASONS FOR GRANTING THE WRIT

1. This Court held in *Griffin v. California*, 380 U. S. 609 (1965), that comment by a prosecutor in his argument on the defendant's failure to testify violates the Fifth Amendment to the Constitution of the United States, as applied to the states by the Fourteenth Amendment. In the course of its opinion, the Court referred to the fact that forty-four states (including Arkansas) "have recognized that such comment is, in light of the privilege against self-incrimination, 'an unwarrantable line of argument.' *State v. Howard*, 35 S. C. 197, 203, 14 S. E. 481, 483." 380 U. S. at 611 n. 3.

It is also well settled that a defendant who chooses to exercise his privilege not to testify is entitled as of right to an instruction to the jury that they are not to draw any adverse inference from the exercise of this right. *Bruno v. United States*, 308 U. S. 287 (1939), construing 18 U. S. C. § 3181, so holds, and numerous Arkansas cases are in accord. *See* Annot., *Right of Accused to Instruction that His Failure to Testify Shall Not be Taken Against Him*, 84 L. Ed. 261, 262 (1940). It follows that had Petitioner requested an instruction that no inference was to be drawn from his failure to testify, and had this request been made when the Court was considering its charge

to the jury as such, prior to final argument, denial of the request would have been reversible error. No such request was made, presumably because petitioner's counsel made the judgment that, as a matter of trial tactics, it would be better not to call the jury's attention to their client's exercise of his privilege.

The closing argument, pertinent parts of which have been set out above, then followed. The effect of the argument was obviously to change the entire trial atmosphere. The decision not to ask for a cautionary instruction with respect to Petitioner's failure to testify now had to be viewed in an entirely different light: Since the prosecuting attorney had himself referred to Petitioner's exercise of the privilege and had as much as told the jury that the Petitioner ought to be convicted because of his exercise of this right, counsel's decision not to request a cautionary instruction had to be changed. Promptly upon the conclusion of the prosecutor's closing argument, and before the jury retired, counsel requested the cautionary instruction quoted above. Petitioner was obviously entitled to the instruction. In holding to the contrary, the court below failed to observe the rule of *Griffin v. California, supra,* and certiorari should be granted to correct this error.

2. Both the trial court and the Supreme Court

of Arkansas, however, failed to reach the merits of this argument. In doing so, they applied a purported rule or practice of state procedure in such a way as to thwart unreasonably the assertion of a federal constitutional right. This case thus raises an important issue as to the obligation of the state courts to decide, on their merits, federal issues that are fairly presented.

The trial court refused the requested cautionary instruction on the ground that it was not timely offered, that is, that it was not offered prior to argument, at the time when the remainder of the court's charge was settled by court and counsel. The instruction was not offered prior to argument, of course, because it was not until the argument had been completed that the necessity for the instruction had become apparent. An instruction that the jury should disregard a portion of an argument could hardly be offered before the argument had taken place. The trial court's holding that the instruction was not timely offered therefore lacks any basis in reason.

On appeal, the Supreme Court of Arkansas upheld the refusal of the instruction for the following reason:

> Appellant did not object to the instructions given before the arguments commenced nor

> to the matter of which he now complains while the argument was being made. Thus he is not now in a position to complain that the trial court erred (App. p. 7 a).

This reasoning is subject to the same infirmities as the trial court's original ruling that the instruction requested was untimely. Petitioner could hardly have requested the instruction before the argument, in view of the fact that the reason for the instruction did not exist at that time. While it may be true, as a general rule, that no objection to matter contained in an argument may be preserved unless the argument is interrupted and the objection immediately made, Petitioner is not seeking review in this Court of the improper argument as such. He is seeking review of the refusal to give an instruction that would have removed the prejudicial effect of the improper argument.

The opinion of the court below contains only two supporting citations, neither of which is authority for the conclusions reached. In *Parrott v. State*, 246 Ark. 655, 439 S. W. 2d 924 (1969), that court refused to reverse a conviction because of allegedly improper statements made by the prosecuting attorney in his opening and closing remarks, but in so holding the opinion reached the merits and held that the prosecutor's closing argument was "within the bounds of permissible argument and fairness." 246 Ark. at 661,

439 S. W. 2d at 927-28. And *Stockton v. State*, 239 Ark. 228, 388 S. W. 2d 382 (1965), simply states that once defendant has made an objection to an allegedly improper argument, and the trial court has admonished the jury to disregard the argument, no further error with regard to the impropriety of the argument may be urged in the absence of a further objection setting forth defendant's contention that the judge's cautionary instruction was inadequate to remove whatever prejudice the argument had produced. The present case is, of course, wholly distinguishable from this situation. Here, no cautionary instruction was ever given, so the question of such an instruction's adequacy could never arise. Thus, in addition to the other problems this case raises, Petitioner appears to be the victim of an alleged rule or practice of state criminal procedure of which prior Arkansas cases gave no clear notice. Waiver of a federal right should not be grounded on so shaky a foundation.

Indeed, the opinion below, declining to review on its merits Petitioner's argument that the trial court erred by not giving a cautionary instruction, itself injected into the case a new and serious issue of due process. Due process of law, as embodied in the Fourteenth Amendment of the Constitution of the United States, implies as a minimum that parties shall have

a fair opportunity to present arguments to the court, and that these arguments shall, in the ordinary case, be upheld or rejected on their merits. This is not to say, of course, that states may not have procedural rules under which, from time to time, it may be held that even federal rights are waived. It does mean, however, that a procedural rule invoked as a basis for a holding that a federal right has been waived, must have some substantial relation to the fair, efficient, and proper administration of justice. A rule that requires counsel to interrupt closing argument and then and there to offer whatever cautionary instruction he believes is required by impropriety occurring in that argument, or else be forever barred from raising any such point, simply serves no rational purpose. No prejudice whatever would occur to the State of Arkansas or to the administration of criminal justice from permitting an instruction, claimed to have become necessary because of material contained in closing argument, to be offered at the conclusion of the argument. In fact, it may not be clear until the argument has been concluded whether or not defendant wishes or needs such an instruction. It is fundamentally irrational to say to a defendant, in effect: "Your argument may have merit, it is based upon the Constitution of the United States, the facts that have occasioned you to advance it have only just now occurred,

the jury has not yet retired and could be further instructed at this time, but the court will not consider your argument because you did not make it five minutes ago."

It is worth emphasizing again that the right claimed here is based upon the federal constitution. The words of Mr. Justice Holmes in *Davis v. Wechsler*, 263 U. S. 22, 24 (1923), are directly applicable: "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." There is no question that Petitioner's request for an instruction with regard to his right not to testify was plainly and reasonably made. If the jury had already been in the jury room, the court would have been fully justified in refusing to consider the request. But the jury had not retired, no one had changed his position in reliance upon counsel's failure to interrupt the prosecutor's closing argument, and no prejudice could conceivably have resulted from considering the requested instruction on its merits. Furthermore, it appears from *Lee v. State*, 145 Ark. 75, 23 S. W. 373 (1920), that the trial court could, in its discretion, have considered the instruction on its merits. In other words, it would not have been error

for the trial court to consider the instruction and accept or reject it without regard to any asserted procedural default on Petitioner's part. Where the right asserted is based upon the federal constitution, this discretion, in the absence of extraordinary circumstances not appearing here, should have been exercised in favor of considering the asserted right on its merits.

Most of the criminal law of this country is, and should be, enforced in the state courts. In the course of their discharge of this duty, those courts will inevitably be asked on many occasions to rule on claims of federal right. This Court obviously cannot superintend the manifold details of state criminal practice. But it can be alert to see that fairly presented federal claims are decided on their merits. Here, Petitioner's right to a state-court adjudication of the merits of his federal claim is at stake. This case thus presents a frequently recurring problem in the administration of criminal justice — a problem deserving of this Court's time and attention.

CONCLUSION

The writ of certiorari should be granted to review the judgment of the Supreme Court of Arkansas. On plenary consideration, that judgment should be reversed and the cause remanded for a new trial, or, in the alternative, the cause should be remanded to

the Supreme Court of Arkansas with instructions to that court to decide Petitioner's federal claim on its merits.

Respectfully submitted,

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APPENDIX

B. FRANK CAMP v. STATE OF ARKANSAS

5541

Opinion delivered February 15, 1971

Appeal from Mississippi Circuit Court, *A. S. (Todd) Harrison*, Judge; affirmed.

Lee Ward and *James A. Crislip*, Memphis, for appellant.

Joe Purcell, Attorney General, *Mike Wilson*, Asst. Atty. Gen. for appellee.

CONLEY BYRD, Justice. B. Frank Camp appeals from an embezzlement conviction alleging the errors hereinafter discussed.

Mr. Camp was the assistant administrator of the Osceola Memorial Hospital from June 1968 to August 1, 1969. During that time he handled approximately $750,000 belonging to the hospital. It is stipulated that during that time Mr. Camp purchased items totalling $20,131.18 for his own use with hospital funds.

Clarence Johnson testified that he was employed to audit the hospital records. During a routine audit, he observed a number of discrepancies. One such item was check No. 2781 to Central Supply Co. for a harvest gold tub, gold-plated shower head, gold plated drain,

gold Lady Fair lavatory, gold-plated fittings, harvest gold toilet, avocado green tub, chrome plated grab rails, drain, showerhead, fixtures with charcoal handles, avocado closet and seat, green lavatory and chrome plated fixtures with charcoal handles charged to the hospital's "Maintenance and Power Plant" account. When Mr. Camp was first questioned about these items, he told witness that they had been acquired by the hospital for the "V. I. P." room. It is now stipulated that they were acquired for Camp's own use.

The purchases in the stipulation were charged to some thirty different accounts on the hospital records.

Johnson, in addition to the stipulated items, outlined an additional $5,394.18 received by Camp for which he had not accounted. Some of the latter consisted of checks from the Coca Cola, Pepsi-Cola and Dr. Pepper bottlers endorsed by Camp.

Mr. John Cherry, the hospital administrator, testified that he employed Camp at a starting salary of $10,000 per year. Cherry said that neither Camp nor any other employee had authority to purchase groceries through the hospital. Neither had Camp discussed furnishing materials or anything through the hospital for construction of Camp's home. Cherry knew that in the past certain things were purchased by individuals and charged to the hospital, such as tires and a freezer

but in those instances the items were shown as being charged and owed to the hospital by the individual involved. Mr. Cherry said there is a world of difference between $20,000 and a set of tires. When Camp met with the hospital board on July 31, 1969, Cherry recalled that Camp then only admitted some $17,000 worth of items had been purchased for his own use.

Some of the hospital board members were called to show that no permission had been given to Camp to make the purchases on the hospital's account. One was Mr. Harold Ohlendorf, who stated that the problem of employees' purchases through the hospital was administrative and that the administrator had authority to grant such permission. However, Mr. Ohlendorf knew of no such permission given to Mr. Camp. In fact Mr. Ohlendorf says that he asked Camp, "Frank, why did you do this?" and that Camp replied, "I don't know. I don't have any excuse. I made a mistake." Admittedly Mr. Ohlendorf needed a hospital bed for his mother that he acquired through the hospital and for which he paid promptly.

Needless to say, the evidence is more than sufficient to sustain the conviction.

The trial court properly overruled the motion to strike the indictment. The motion was made on the premise that appellant was allowed to appear before

the grand jury and testify without being told that anything he said could be used against him. The argument is apparently based upon *Miranda v. Arizona*, 384 U. S. 436, 16 L. ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R. 3d 974 (1966). *Miranda* has no application here because Camp voluntarily appeared before the grand jury at the request of his counsel of record.

The trial court required the State and appellant to voir dire a prospective juror before the State was required to peremptorily challenge him. In this the trial court did not err. See Ark. Stat. Ann. § 43-1903 (Repl. 1964) and *Lackey v. State*, 67 Ark. 416, 55 S. W. 213 (1900).

We are unable to say from the record that the trial court erred in refusing appellant's challenge for cause to prospective jurors Culbert D. Gwaltney and William E. Ward. All the record shows is appellant's objection as dictated into the record and the trial court's refutation of appellant's alleged bias of the jurors. Upon the record before us, it is impossible to say that the trial court committed error.

On cross-examination of Johnson, the CPA, appellant developed that Johnson was paid $14,700 in fees for work done in 1968 and 1969. Appellant now complains that the trial court should have permitted him to show the number of hours that Johnson worked to

earn that sum. The matter sought to be inquired of was certainly immaterial to the issues before the court and under the circumstances we find no prejudicial error or abuse of discretion.

Appellant during the trial asked the court to strike some remarks of the prosecution. The court then told the jury to "completely disregard statements of counsel . . . and of a personal nature as having no value. . . ." At that time counsel made no further objections or exceptions. He cannot now be heard to complain.

The trial court properly instructed the jury that it could convict appellant for any act of embezzlement committed within three years prior to the filing of the information. Appellant now complains that evidence was introduced showing that appellant had unlawfully used some credit cards after the date in the indictment. Appellant permitted the evidence to be introduced without objection or cautionary instruction. Under those circumstances, he is not in a position to now complain of error.

Appellant also complains, relying upon *State v. Guthrie*, 176 Ark. 1041, 5 S. W. 2d 306 (1928), that the trial court should have given his requested instruction No. 1 as follows:

"You are further instructed that before you may

> find that funds were fraudulently converted to his own use by the defendant you must first find beyond a reasonable doubt that (1) the defendant had no permission, either express or implied, from his superior or employer to use such funds for his own benefit, and (2) also that, at the time of using such funds for his own benefit, the defendant had an intention permanently to deprive his employer of such funds."

State v. Guthrie, relied upon by appellant, involves that embezzlement that arises through the co-mingling of another's funds with those of an insolvent corporation and is not authority for that embezzlement that arises when public funds are converted to the use of the person charged. See *Russell v. State*, 112 Ark. 282, 166 S. W. 540 (1914). In this connection the court properly told the jury by its instruction No. 7 that an intent to repay is not a defense to a charge of embezzlement.

Appellant complains that the trial court did not properly admonish the jury when the prosecuting attorney argued to the jury about appellant's news releases to the newspapers about his trying to repay the money. The trial court told the jury that arguments of counsel were not evidence and should not be considered by them as such. We hold this was sufficient under the record.

Appellant also complains of certain arguments

made by the prosecuting attorney in his jury summation and of the trial court's failure after the arguments to instruct the jury that a plea of not guilty constitutes a contradiction of every fact introduced by the State. Appellant did not object to the instructions given before the arguments commenced nor to the matter of which he now complains while the argument was being made. Thus he is not now in a position to complain that the trial court erred. *Parrott v. State*, 246 Ark. (April 14, 1969), 439 S. W. 2d 924; *Stockton v. State*, 239 Ark. 228, 388 S. W. 2d 382 (1965).

FOGLEMAN, J., not participating.

CRIMINAL JUDGMENT AFFIRMED — ORDER TO SURRENDER

STATE OF ARKANSAS

IN THE SUPREME COURT

Proceedings of 2-15-1971

B. Frank Camp v. The State of Arkansas, Appeal from Mississippi Circuit Court, Osceola District.

This cause came on to be heard upon the transcript of the record of the Circuit Court of Miss. County, Osceola District, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said Circuit Court in this cause,

It is therefore considered by the Court that the judgment of said Circuit Court in this cause rendered be and the same is hereby in all things affirmed with costs; and that unless appellant shall FORTHWITH surrender himself to the SUPREME COURT in execution of said judgment, his bond be declared as forfeited.

It is further considered that said appellee recover of said appellant all her costs in this Court, in this cause expended and have execution thereof.

In testimony whereof that the above is a true copy of the judgment of said Supreme Court, in the case therein stated,

Jimmy H. Hawkins, Clerk of said Supreme Court, hereunto set my hand and affix the seal of said Court, at my office in the City Little Rock, this 1st. day of June A. D. 1971.

Jimmy H. Hawkins, Clerk

By Carl H. Baker, D. C.

STATE OF ARKANSAS, }
In the Supreme Court } SCT.

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 10-5-70 day, being the first Monday of October, A. D. 1970, amongst others were the following proceedings, to-wit:

On the 5th. day of April, A. D. 1971, a day of said term.

B. Frank Camp, Appellant
No. 5542 vs.
State of Arkansas, Appellee

Appeal from Mississippi Circuit Court
Osceola District

Petition for rehearing is denied.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case therein stated, I, JIMMY H. HAWKINS, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 1st. day of June, A. D. 1971.

Jimmy H. Hawkins, Clerk
By Carl H. Baker, D. C.